Petition

Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS
CLERK

81-1932

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NO._____

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981

* * * * * * * *

James W. McCarty, Petitioner

v.

United States of America, Respondent

* * * * * * * *

ON CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

* * * * * * * *

PETITION FOR WRIT OF CERTIORARI

* * * * * * * *

JAMES W. McCARTY
Petitioner pro se
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Dallas, Texas 75243
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QUESTIONS PRESENTED FOR REVIEW

WHETHER THE RULING IN THE INSTANT CASE BY THE COURT OF APPEALS FOR THE FIFTH CIRCUIT ON THE ISSUE OF THE SUBJECTIVE INTENT OF THE PETITIONER IS IN FORM WITH THE HOLDING OF THIS COURT IN UNITED STATES V. MURDOCK; AND WITH THE DECISIONS OF THE FIFTH CIRCUIT IN MANN V. UNITED STATES, WARDLAW V. UNITED STATES, AND HARGROVE V. UNITED STATES.

WHETHER THE SIXTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES HAS BEEN MISTAKENLY CONSTRUED SO AS TO TAX DIRECTLY THE LABOR OF THE PETITIONER, IN VIOLATION OF ARTICLE I, SECTION 9, CLAUSE 4 OF THE CONSTITUTION OF THE UNITED STATES, AND OF THE INTENT OF CONGRESS AT THE TIME THE AMENDMENT WAS PASSED.

WHETHER THE CONVICTION AND SUBSEQUENT AFFIRMATION OF THE CONVICTION OF THE PETITIONER BY THE FIFTH CIRCUIT MUST BE HELD VOID FOR WANT OF GRANT OF JURISDICTION BY THE CONGRESS TO A SPECIFIED COURT FOR THE PROSECUTION OF CRIMES DESIGNATED UNDER 26 USC.

TABLE OF CONTENTS

	Page
Questions presented for Review	i
Table of Contents	ii
Table of Authorities	iii
Opinion below	2
Jurisdiction	2
Constitutional provisions and Statutes involved	4
Statement of the Case	5
Summary of the Argument	6
Argument	7
Conclusion	32
Affidavit of Service	34
Exhibit "A"	35
Exhibit "B"	38

TABLE OF AUTHORITIES

	Page
Brushaber v. Union Pacific R.R. Co., 240 U.S. 1 (1915)	13,15,16, & 18
Connor v. United States, 303 F.Supp. 1187 (S.D. Tex. 1969)	17
Eisner v. Macomber, 252 U.S. 189 (1919)	15,16,18, & 19
Ex Parte Bollman & Swartwout, 8 U.S. 75	30
Hargrove v. United States, 67 F2d 820 (5th Cir.1933)	3,5,6 & 9
James Brown v. Richard Keene, 33 U.S. 112 (1834)	31
Magruder v. Segebade, 94 F2d 177 (4th Cir. 1938)	15
Mann v. United States, 319 F2d 404 (5th Cir.1963)	3,5,6 & 8
Maxfield's Lessee v. Levy (1), 4 U.S. 308	26,31
McCulloch v. Maryland, 4 Wheat. 316	27
Nicholas v. Fifteenth Street Inv. Co., 105 F2d 289 (10th Cir. 1939)	15
Pollock v. Farmers'Loan & Trust Co., 158 U.S. 601 (1895)	12,13,14 15 & 18
The Cherokee Nation v. The State of Georgia, 5 Peters 2 (1831)	31

The State of Rhode Island et al v. The Commonwealth of Mass., 37 U.S. 657 — 31

Turner v. Bank of North America, 4 Dall. 8 — 24

Wardlaw v. United States, 203 F2d 884 (5th Cir. 1953) — 3,5,6 & 9

United States v. Greenlee, 517 F2d 899 (3rd Cir. 1975) — 10

United States v. Hawk, 497 F2d 365 (5th Cir. 1974) — 10

United States v. Hudson, 11 U.S. 7, (1812) — 28

United States v. Martell, 199 F2d 670 (3rd Cir. 1952) — 10

United States v. McCorkle, 511 F2d 482 (7th Cir. 1975)(en banc) — 10

United States v. Murdock, 390 U.S. 389 (1933) — 3,7,9

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JAMES W. McCARTY,

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ON CERTIORARI TO THE
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PETITION FOR WRIT OF CERTIORARI

* * * * * * * *

Petitioner, James W. McCarty, respectfully requests that a Writ of Certiorari issue to review the rulings of the Court

of Appeals for the Fifth Circuit regarding the issues presented herein; and whether the Court of Appeals and the District Court for the Northern District of Texas had jurisdiction to hear the instant case as a matter of law.

OPINION BELOW

An opinion was handed down in this cause by the Unitd States Court of Appeals for the Fifth Circuit; a copy of which opinion is attached to this Petition as Exhibit "A" on page 35.

JURISDICTION

The jurisdiction of this Court is pursuant to Article III, Section 2 of the Constitution of the United States; and the Right to Petition in the First Amendment thereto; and 28 USC 1254(1).

Petitioner is presenting matters which show that there is a substantial

discrepancy created by the Court of Appeals for the Fifth Circuit in their ruling on the issue of the subjective intent of the Petitioner, as compared to their rulings in Mann v. United States, 319 F2d 404 (5th Cir. 1963); Wardlaw v. United States, 203 F2d 884 (5th Cir. 1953); and Hargrove v. United States, 67 F2d 820 (5th Cir. 1933); as well as the decision of this Court in United States v. Murdock, 390 U.S. 389 (1933).

Petitioner represents that the United States of America can show no lawful jurisdictional basis for the action instituted against the Petitioner.

The United States of America, through its agency, the Internal Revenue Service, is punishing the Petitioner for not voluntarily turning over a portion of his earnings from labor to the government. The Sixteenth Amendment did not allow for taxation of the labor of the Petitioner.

The case being presented for review is that of United State v. James W. McCarty, Nos.80-2231 & 81-1021, on the Summary Calendar, decided January 11, 1982. See Exhibit "A" attached.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

AMENDMENT SIXTEEN:

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

26 USC 7203:

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

STATEMENT OF THE CASE

Both the District Court for the Northern District of Texas and the Court of Appeals for the Fifth Circuit failed to address the question presented by the Petitioner regarding jurisdiction of these two courts over actions brought under 26 USC, when such actions are criminal in nature.

The United States of America did not make proper showing of jurisdiction at either the District level, nor on appeal. The Petitioner appealed his conviction of the charges brought under 26 USC 7203 for failure to file based upon the fact that the trial court had nullified the defense of the Petitioner in its instructions to the jury, and contrary to the rulings of the Court of Appeals for the Figth Circuit in Mann, Wardlaw, and Hargrove, supra, as well as the holding of this Court in Murdock, supra.

The conviction of the Petitioner was affirmed by opinion, a copy of which is attached as Exhibit "A", and Petitioner then submitted a Petition for Rehearing en Banc, which was subsequently denied.

From this denial, Petitioner now applies to this Court for a Writ of Certiorari.

SUMMARY OF THE ARGUMENT

The question is respectfully raised whether the Court of Appeals for the Fifth Circuit can set different standards for ruling on cases presented to it in the matter of the subjective intent of a defendant; and whether their ruling in the instant case which deviates far from their rulings in Mann, Wardlaw, and Hargrove must govern this situation.

The question is respectfully raised whether the ruling in the instant case by

the Court of Appeals for the Fifth Circuit must conform to the holding of this Court in United States v. Murdock, supra.

The question is respectfully raised whether the Sixteenth Amendment to the Constitution of the United States was meant to tax the labor of the Petitioner, as well as income derived from the labor of the Petitioner.

The question is respectfully raised whether the Federal District Court for the Northern District of Texas has jurisdiction to adjudicate the matter presented to it under authority of Title 26 United States Code, Section 7203, when Congress has not conferred jurisdiction on any court by an Act so designating such jurisdiction for crimes defined in Title 26.

ARGUMENT

The Petitioner respectfully presents the following to this Honorable Court:

THE RULING BY THE FIFTH CIRCUIT IN THE INSTANT CASE ON THE ISSUE OF THE SUBJECTIVE INTENT OF THE PETITIONER IS NOT IN FORM WITH THIS COURT'S HOLDING IN MURDOCK; NOR WITH THE FIFTH CIRCUIT'S DECISIONS IN MANN, WARDLAW, AND HARGROVE

In confirming the conviction of the Petitioner, the Fifth Circuit was careful not to cite any authority for that part of their opinion regarding the subjective intent of the Petitioner.

In the opinion of the Court of Appeals for the Fifth Circuit, [see Exhibit A at page 35] at page 569 the court stated that, "... the accused should subjectively have known that his belief was unfounded." This statement imposes an objective standard on the intent of the Petitioner and is contrary to the Fifth Circuit's own rulings in Mann v. United States, 319 F2d 404 (5th Cir. 1963), wherein the that court reversed a tax evasion conviction due to the instruction that a person is presumed to intend the natural consequences of his

acts. There the court held that the intent required was a "subjective" intent, making such a burden shifting presumption an almost impossible barrier to the defendant. Further, the court stated that the instruction invited the jury,

> "...to speculate as to what any other person similarily situated to Dr. Mann and with like knowledge, would reasonably have expected to be the consequences of his conduct." Id., at page 409.

In Wardlaw v. United States, 203 F2d 884 (5th Cir. 1953), the court held intent to be an "actual bonafide misconception of the law", at page 885.

In Hargrove v. United States, 67 F2d 820 (5th Cir. 1933), the court referred to "actual knowledge of the existence of obligation and a wrongful intent to evade it."

The ruling in the instant case is also in conflict with this Court's holding in United States v. Murdock, 390 U.S. 389

(1933), wherein this Court held that the element of willfulness requires first that the defendant have an actual knowledge that he is required to file, and secondly that he deliberately and intentionally fails to file with the specific intent to violate the law. Id., at page 396. See also United States v. McCorkle, 511 F2d 482 (7th Cir. 1975)(en banc), at page 484; United States v. Greenlee, 517 F2d 899 (3rd Cir. 1975), at page 904; United States v. Hawk, 497 F2d 365 (9th Cir. 1974), at page 368; and United States v. Martell, 199 F2d 670 (3rd Cir. 1952), at page 672.

THE SIXTEENTH AMENDMENT HAS BEEN MISTAKENLY CONSTRUED SO AS TO TAX DIRECTLY THE LABOR OF THE PETITIONER, IN VIOLATION OF ARTICLE I, SECTION 9 OF THE CONSTITUTION OF THE UNITED STATES

The so-called income tax being paid by wage earners and self-employed persons is not the tax allowed by the Sixteenth Amendment.

The Petitioner in this case is a watchmaker. He is contending that the fruit of his labor is not subject to federal income taxation. He further contends that the Sixteenth Amendment to the United States Constitution which empowered Congress to lay and collect taxes on incomes, from whatever source derived, without apportionment among the States, and without regard to any census or enumeration, was never intended to provide for income taxation of labor at the source. The legislative history bears this out.

As indicated by excerpts from the Congressional Record, it was intended that tax on individual incomes was to be borne by the wealthy more than by those less fortunate. Comments in the Congressional Record about paying income taxes directly in proportion to wealth are clear. See pages 4109 and 4430-4440 of the Congressional Record, July 12, 1909. The

purpose of income tax was to tax wealth, not want. It was to tax accumulated possessions, not consumption. See page 4436, supra.

The Congressional Record at pages 3829-3850 indicates that Congress intended to tax only net incomes from businesses. What was to be taxed was property, capital and investments, not human energy, human exertion and human service. See page 3838, supra.

There is ample reference to the taxing of incomes of only $3,000 and above. In 1909 an income of $3,000 per year or more, taking into account the effect of inflation, would have been considerable. Such an income at that period of time would indeed be the income of a wealthy person.

The purpose of the Sixteenth Amendment was to give relief from the Supreme Court case of Pollock v. Farmers' Loan and Trust Co., 158 U.S. 601, 15 S.Ct. 912 (1895).

Pollock held that a tax on all of a person's income from property is a direct tax on the property. And because the tax being dealt with provided for a direct tax, the Pollock Court further found that the legislation did not allow for apportionment within the meaning of Article 1, Section 9, Clause 4 of the main body of the United States Constitution. Therefore, the lack of apportionment meant that the tax violated this part of the Constitution.

The Supreme Court in Brushaber v. Union Pacific R. R. Co., 240 U.S. 1, 36 S.Ct. 236 (1915) held that the purpose of the Sixteenth Amendment was only to relieve the apportionment requirement. Moreover, the Court in Brushaber also held that the Sixteenth Amendment did not change what taxing power Congress already had.

Consequently, under the Sixteenth Amendment, Congress could exercise only those taxing powers vested in it by virtue

of the main body of the United States Constitution; however, Congress could do so without the necessity of apportionment among the States.

The thrust of Petitioner's argument is that Congress exceeded its authority in enacting §61 of the 1954 Internal Revenue Code by defining wages (labor) as income within the meaning of the Sixteenth Amendment. If wages (labor) are income, then they need not be apportioned; if wages (labor) are not income, then a tax upon wages is a direct tax and must be apportioned. Pollock v. Farmers' Loan and Trust Co., supra.

Among other things, Pollock held that a tax on all the income of property is a direct tax. Taxing total income at the source was not the legislative intent behind the Sixteenth Amendment, as seen from the Congressional Record. The question in Pollock was whether a tax on

all the income from real and personal property was invalid. Pollock held that a tax on all of the income is a tax on all of the property and, hence, direct. Accordingly, that tax was subject to apportionment.

Consistent with that legislative intent was the holding in Brushaber, supra, finding that one of the additional purposes of the Sixteenth Amendment was to prevent taxing income at the source.

The Sixteenth Amendment does not define income. Magruder v. Segebade, 94 F2d 177 (4th Cir.1938). Moreover, what is income cannot be extended by legislative definition. Nicholas v. Fifteenth Street Inv. Co., 105 F2d 289 (10th Cir. 1939).

The leading case on what is the definition of income is Eisner v. Macomber, 252 U.S. 189, 40 S.Ct. 189 (1919). This case held that income is the gain derived from capital, from labor, or from both combined.

Eisner dealt with the question of whether a stock dividend was taxable as income. The Court held that a stock dividend was not income, but was merely an accretion to captial and not taxable.

The primary difficulty with taxing labor is that it constitutes a tax upon the source of the income and not a tax on income or gain. The Eisner case supports the clear holding of Brushaber in which the Court held that the Sixteenth Amendment was designed to avoid a direct tax on the source of income as opposed to a tax on the income.

There are many cases following Eisner which hold that business entities are taxed on net income; that is gross income less the cost of materials, overhead and expenses. This is not subject to dispute.

The taxing of labor, however, is inconsistent with this concept. Eisner, the leading case on the definition of income, does not stand as authority for the

proposition that labor may be taxed as income. Furthermore, no reported decisions have defined labor as income and, therefore, subject to tax. The case of Connor v. United States, 303 F.Supp. 1187 (S.D. Tex. 1969) dealt with the question of reimbursement for payment of rental and living expenses being subject to tax. The taxpayer's insurance company reimbursed him for his rental and living expenses while his home was being repaired. The Internal Revenue Service attempted to tax these reimbursements as ordinary income.

The Court in Connor held that these reimbursements were not taxable. The question then becomes if these payments from the insurance company for rental and living expenses are not taxable, then why would these same amounts for the same expenses be taxable if they came from the taxpayer's labor?

The taxing of labor is a tax upon the

source itself. This was the nature of the holding in Pollock. Brushaber shed further light upon the subject by holding that a direct tax upon the source of income was not the purpose of the Sixteenth Amendment.

What has occurred is that Congress has unilaterally and without constitutional authority imposed a direct tax upon labor. This is an excessive use of Congress' power, and it cannot be supported by either the Sixteenth Amendment or the case law.

The language of the Sixteenth Amendment states that income is to be taxed "from" the source. The amendment does not permit taxing "of" the source itself.

It may not be correct to say that all labor is not subject to income tax. It may be possible for part of someone's labor to be a gain or profit within the meaning of Eisner, supra. However, the Petitioner is a laborer. As the foregoing is applied to him, no portion of his labor is taxable

because all of his compensation only represents reimbursement for labor expended.

This presents the same situation in which a business entity is not taxed on that portion of its gross income which is applied to the cost of goods sold or the cost of doing business. Therefore, compensation for labor is not income and is not subject to taxes except to the extent that a part thereof represents gain or profit. It may be possible to attribute to a tradesman a basis for his labor and to tax as income what he receives in excess of this basis.

In the 1916 and 1939 Income Tax Acts and in the 1926 Revenue Act, the Term "income" was defined as "gains, Profits and income derived from [emphasis added] salaries, wages or compensation for personal services." These three acts were consistent with the definition found in the Eisner case.

It appears from a fair reading of these acts that these were enacted in accordance with the original Congressional intent. However, somewhere along the line, Congress and the Internal Revenue Service exceeded their authority by taxing labor as income, not income "from" labor.

It is significant that no reported decision holds that labor constitutes income. This finding is also consistent with the original Congressional intent.

Congress has exceeded its authority under the Sixteenth Amendment to the Constitution of the United States of America by enacting legislation which imposes a tax upon labor as income, rather than on income derived from labor. Moreover, Congress has imposed a tax on the source of the income, rather than on the income itself.

In so doing, the Respondent has deprived the Petitioner of due process of

law guaranteed to the Petitioner under the Fifth Amendment to the Constitution of the United States of America.

Petitioner is aware of the fact that the obligation to pay federal income taxes is a longstanding fiction in this country. Petitioner is also aware of the fact that this Court receives information from sources, other than the general public, and which should be reliable, concerning this argument. However, maintaining a policy of enforcing the tax laws for political purposes should not be a determinitive factor in decisions, or refusal to make decisions, of this Court. Petitioner believes that it is the duty of this Court to correct the error created by Congress, and to pull in the reins of a legislature running roughshod over his rights, and his absolute right to the fruits of his labor.

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THE QUESTION IS RESPECTFULLY RAISED WHETHER CONGRESS MUST DESIGNATE SPECIFIC ACTS OR OMISSIONS AS CRIMES, AFFIX A PENALTY, AND SPECIFY A COURT TO EXERCISE JURISDICTION, IN ORDER FOR THE PETITIONER TO BE LAWFULLY CHARGED WITH A TAX CRIME UNDER 26 USC?

Appellant raised the question of want of jurisdiction as far back as at the administrative level of the Internal Revenue Service, prior to suedo-criminal charges being brought under 26 USC 7203.

The fact that all criminal statutes were consolidated under Title 18 in 1909 is undisputed. Since the enactment of the Internal Revenue Code, Title 26, there has been no attempt to classify crimes defined under 26 USC in 18 USC for purposes of prosecution of such offenses.

Congress has not conferred specific jurisdiction on the federal courts to adjudicate any crimes defined under 26 USC. This does not mean that Congress cannot define crimes in 26 USC; but, in order to prosecute any crime defined under any

Title, including 26 USC, Congress must confer specific jurisdiction upon the court designated to adjudicate such matter. This the Congress has not done with respect to crimes defined under 26 USC; nor has Congress made the acts or omissions which are defined as crimes in 26 USC part of the criminal code under 18 USC.

The Court is referred to Exhibit B on page 38 of this Petition; which Exhibit B demonstrates the jurisdiction of the federal courts under §546 of 18 USC, 1940 edition.

Crimes at that time [1940] did not include tax crimes as defined in 26 USC, and to this day do not include such tax crimes.

Except for the original jurisdiction of the Supreme Court, which comes from the Constitution, two prerequisites must be present in order for the lower courts, District Courts and Courts of Appeals, to

have jurisdiction over a matter before it; first, the Constitution must have given the courts the capacity to receive it; and, second, an Act of Congress must have conferred it.

Petitioner acknowledges the capacity of the District Courts to receive this jurisdiction, but argues that no "Act of Congress" conferring jurisdiction in a criminal matter ever has been passed concerning violations of crimes defined in 26 USC. Congress granted civil jurisdiction via 28 USC 1340. However, a grant of jurisdiction regarding the crimes defined in 26 USC has never been made.

Petitioner, therefore, stands firm on his claim that the District Court lacked jurisdiction; and this claim is backed by Turner v. Bank of North America, 4 Dall. 8, at page 10 where the Court held,

> "If Congress has given power to this court, we possess it, not otherwise; and if Congress has not given the

> power to us, or to any other court, it still remains at the legislative disposal."

Petitioner states that jurisdiction over violation, other than civil, of 26 USC is still at legislative disposal. Congress could state that all violation of 26 USC are criminal offenses, set a penalty to each offense, and state that the federal courts have jurisdiction, whether the offense is a felony or a misdemeanor. If Congress did this, the citizen would have his Constitutional rights preserved. That is not the case now when the court claims jurisdiction by implication.

This Court is aware of the fact that agents of the Internal revenue Service perform a dual function, civil and criminal, in the investigation of tax matters. This dual role could not be tolerated under specific criminal regulation. Cases would have to be classified as civil or criminal at the

outset.

This Court held in Maxfield's Lessee v. Levy (1), 4 U.S. 308,

> "The jurisdiction of this court is not prima facie general, but special. (b) A man must assign a good reason for coming here. If the fact is denied, upon which he grounds his right to come here, he must prove it. He, therefore, is the actor in the proof; and, consequently, he has no right, where the point is contested, to throw the onus probandi on the defendant."

Petitioner raised the question of want of jurisdiction at the administrative level of the IRS, then at the District Court, and at the Court of Appeals. The question fell on deaf ears; and the Court of Appeals said that they did not even understand the question. Be that as it may, the question is now before this court.

Petitioner has been unable to find any grant of power which allow the courts to adjudicate civil statutes in criminal cases. Petitioner again concedes that federal courts have jurisdiction over civil cases

via 28 USC 1340; but not criminal!

The delegates to the Constitutional Convention, prior to the formation of the union of States, were very jealous of their right to rule themselves; and there was great debate over how much power the individual States should relinquish in order to form a union for their mutual good and protection. The delegates, therefore, drafted the Constitution of the United States, granting limited powers to the federal government.

In an opinion by Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat. 316 at page 405, the Court held,

> "This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent, to have required to be enforced by all those arguments which it's enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted."

During the early years of this union,

the judges of the federal courts were solicitous to avoid overstepping their enumerated powers. It made no difference whether a party to a suit was trying to get the court to claim jurisdiction; or whether the party was arguing the validity of the jurisdiction claimed. In each case the court was very careful to note whether the jurisdiction had been specifically written into the particular statute that was the cause of the suit. For example, the Court held in U. S. v. Hudson, 11 U.S. 7 (1812),

> "The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offense. Certain implied powers must necessarily result to our Courts of justice from the nature of their institution. But jurisdiction of crimes against the state is not among those powers."

It is clear from the above quote alone that the District Court for the Northern District of Texas did not have jurisdiction to put the Petitioner on his trial. The

District Court assumed jurisdiction; and the Court of Appeals did likewise. This conduct regarding jurisdiction is not permitted.

There can be no such thing as a criminal offen se supported by civil statutes; neither can there be a civil violation of criminal laws. The conclusion would, of necessity, be that Congress does not have the power to grant criminal jurisdiction to any court over cases based on civil statutes. Congress would first have to make violations crimes. If Congress were to do this, the statute would no longer be civil in nature.

Has Congress specifically designated as crimes, violations of 26 USC, affixed a penalty to such violations, and designated or created a court to exercise jurisdiction over such crimes? The answer is NO!. Crimes have been defined in 26 USC, and penalties prescribed, but no court has been

granted jurisdiction to adjudicate such crimes. Therefore, the crimes have only been defined; violations cannot be enforced without the specific grant of jurisdiction to a specific court.

Petitioner is of the opinion that the District Court and the Court of Appeals for the Fifth Circuit believe that jurisdiction is implied. Jurisdiction cannot be taken by implication, as held in the following cases,

> "As a preliminary to any investigation of the merits of this motion this court deems it proper to declare that it disclaims all jurisdiction not given by the constitution, or by the laws of the United States. ... Courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction.... To enable the court to decide on such question, the power to determine it must be given by written law." Ex Parte Bollman & Swartwout, 8 U.S. 75, 93-94.

> "No Court in America ever yet thought, nor, I hope, ever will, of acquiring jurisdiction by a fiction. ...it is evident that we are not to assume a voluntary jurisdiction, because we think, or others may think,

> it may be exercised innocently, or even wisely. The court is not to fix the bounds of its own jurisdiction, according to its own discretion. A jurisdiction assumed without authority, would be equally an usurpation, whether exercised wisely, or unwisely." Maxfield's Lessee v. Levy (1); 4 U.S. 308 (1797), at page 312.

> "Before we can look into the merits of the case, a preliminary inquiry presents itself. Has this court jurisdiction of the cause." The Cherokee Nation v. The State of Georgia, 5 Peters 2 (1831).

> "The decisions of this court require, that the averment of Jurisdiction shall be positive, that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred augumentatively from its averments." James Brown v. Richard Keene, 33 U.S. 112 (1834), at page 115.

In the instant case, the District Court and the Court of Appeals for the Fifth Circuit are of the opinion that the issue of want of jurisdiction raised by the Petitioner is frivolous. In The State of Rhode Island et al v. The Commonwealth of Mass., 37 U.S. 657, the Supreme Court held quite to the contrary, at page 719,

> "...this Court is one of limited and special original jurisdiction, its action must be confined to the particular cases, controversies, and parties over which the constitution and laws have authorized it to act; any proceeding without the limits prescribed, is coram non judice, and its action a nullity."

CONCLUSION

That the decision of the Fifth Circuit Court of Appeals is in conflict with prior decisions of this Court, and with other rulings of the Fifth Circuit regarding the subjective intent of the Petitioner; that the income tax as applied to the fruits of the labor of the Petitioner is in violation of Article I, Section 9, Clause 4 of the Constitution of the United States of America; and, that the violations of 26 USC 7203 of which the Petitioner was convicted cannot stand for want of grant of jurisdiction by Congress to a court in order to prosecute such offense.

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this Court grant its Writ of Certiorari in order that substantial justice may be had with respect to the issues presented herein.

DATED this 16th day of April, 1982.

Respectfully submitted,

JAMES W. McCARTY
In propria persona
Apartment 204
13933 N. Central Expressway
Dallas, Texas 75243
(214) 231-6751

AFFIDAVIT OF SERVICE

The undersigned hereby certifies that three true and correct copies of the foregoing Petition for Writ of Certiorari have been placed in the U.S. mail, first class postage, and addressed to the Solicitor General, Department of Justice, Washington, D.C. 20530, and two copies to David R. Bickel, Room 16G28, 1100 Commerce Street, Dallas, Texas 75242, on this the 16th day of April, 1982.

_____

JAMES W. McCARTY

STATE OF TEXAS)
)
COUNTY OF DALLAS)

Sworn and attested to before me this 16th day of April, 1982.

_____

Notary Public

Commission expires:

_____

Exhibit

UNITED STATES of America, Plaintiff-Appellee,

v.

James W. McCARTY, Defendant-Appellant.

Nos. 80-2231, 81-1021 Summary Calendar.

United States Court of Appeals, Fifth Circuit.

Jan. 11, 1982.

Defendant was convicted in the United States District Court for the Northern District of Texas, Sarah Tilghman Hughes, J., of wilful and knowing failure to file income tax returns and he appealed. The Court of Appeals held that: (1) the District Court had jurisdiction, and (2) the District Court did not err in instructing the jury.

Affirmed.

1. Internal Revenue ⇐5280

District court had jurisdiction to try defendant charged with wilful and knowing failure to file income tax returns. 26 U.S.C.A. § 7203.

2. Internal Revenue ⇐5317

In prosecution for wilful and knowing failure to file income tax returns, instruction defining "wilfully" as meaning "a voluntary, intentional violation of a legal duty," and providing that "the statutory requirement to file a return does not violate a taxpayer's right against self-incrimination." correctly stated applicable legal principles. 26 U.S.C.A. § 7203.

3. Criminal Law ⇐393(1)

Fifth Amendment privilege protects erroneous taxpayer by providing defense to charge of wilful and knowing failure to file income tax return if taxpayer's claim, though erroneous, was made in good faith, but Fifth Amendment does not allow defendant to refuse to file on ground that he believed that Constitution excused him from obeying the law. 26 U.S.C.A. § 7203; U.S.C.A.Const.Amend. 5.

Appeals from the United States District Court for the Northern District of Texas.

Before GEE, GARZA and TATE, Circuit Judges.

PER CURIAM:

The defendant McCarty was convicted on three counts of a wilful and knowing failure to file income tax returns (for the years 1974, 1975, and 1976). 26 U.S.C. § 7203. His two appeals before us arise out of that prosecution: by the first (No. 80-2231), he appeals the denial of his motion to dismiss the criminal prosecution for the lack of district court jurisdiction; by the second (No. 81-1021), he appeals from his conviction. The contentions raised by these pro se appeals are without legal merit, and we affirm.

Lack of Jurisdiction

[1] We have some difficulty understanding the defendant's contentions that the district court lacked jurisdiction to try him for this violation of the federal tax laws. The contentions are advanced in a many-facted and somewhat confusing lengthy brief. If we can understand

the thrust of the contentions (which also seem to include an assertion that the defendant is immune from criminal prosecution because the income tax law is unconstitutional and its provisions are unconstitutionally vague), the defendant seems to assert that the executive agencies are the exclusive governmental organ to determine tax liability, and that therefore a judicial criminal prosecution is not authorized for noncompliance with tax return regulations—district court jurisdiction, if any, is limited only to judicial review of the administrative determination of a taxpayer's tax liability. The defendant was of the view that the matter should be remanded to the Internal Revenue Service.

No authority whatsoever supports the defendant's contentions. They are without perceivable merit. The prosecution was instituted in a district court with jurisdiction over violations of 26 U.S.C. § 7203 and in which venue was proper. See: 18 U.S.C. § 3231 (jurisdiction of district court over offenses against laws of the United States); 26 U.S.C. §§ 6012, 6091, and 7203 (substantive offense and venue of its commission); *United States v. Rice*, 659 F.2d 524, 526 (5th Cir. 1981). No authority or rational reason is advanced in support of the defendant's contention that the government may not prosecute criminally for a violation of its tax laws, whether or not the government additionally seeks to enforce any civil liability for the nonpayment of taxes due.

The Criminal Conviction Itself

In his appeal from the conviction itself, the defendant complains of inadequate instructions and also that he was not subject to any federal income tax since the Sixteenth Amendment did not really change the former constitutional requirement that direct taxation be apportioned according to population. This latter argument is made in the face of the express language of the Amendment,[1] its undoubted express intention, and an unbroken line of jurisprudence to the contrary. *See, e. g., Lonsdale v. C.I.R.*, 661 F.2d 71, 72 (5th Cir. 1981). The other contentions are equally without merit.

The substance of these contentions as to improper instructions is that they prejudiced the defendant in his contention that the only issue before the jury was his own subjective good faith belief that he had filed his income tax returns for 1974, 1975, and 1976 in compliance with law. (These returns disclosed only his name, address, social security number and occupation—but no numerical information as to income, instead a Fifth Amendment privilege against disclosing same.)

[2] The defendant complains that, therefore, the instruction defining "wilfully" as meaning "a voluntary, intentional violation of a legal duty" incorrectly instructed the jury to apply, not the subjective standard required, but instead an objective standard of what a reasonable taxpayer would believe. To similar effect are the defendant's complaints of the instruction "that the statutory requirement to file a return does not violate a taxpayer's right against self-incrimination." However, both instructions correctly state the applicable legal principles. *See, e. g.*, as to "wilfully": *United States v. Brown*, 548 F.2d 1194, 1199 (5th Cir. 1977) and *United States v. Douglass*, 476 F.2d 260, 263–64 (5th Cir. 1973); and,

1. The Sixteenth Amendment provides: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

as to the self-incrimination instruction, *United States v. Johnson*, 577 F.2d 1304, 1310–11 (5th Cir. 1978).

[3] Here, the district court *did* submit the defendant's good faith defense to the jury on adequate instructions.[2] See *Johnson, supra*, 577 F.2d at 1304: "The Fifth Amendment privilege protects the erroneous taxpayer by providing a defense to the prosecution if the jury finds that the claim, though erroneous, was made in good faith." On adequate evidence, the jury rejected the defendant's "good faith" defense.

The defendant's apparent position is that the charge to the jury should have instructed it that, if the testimony that he *believed* the constitution excused him from obeying the law, then the jury must find the accused "not guilty", even though the evidence overwhelmingly shows that the accused should subjectively have known that his belief was unfounded. We find no support for the contention that an accused's blind assertion of his own good faith must excuse him from criminal liability for his own intentional acts knowingly violating the letter of the law.

Conclusion

Accordingly, we AFFIRM the convictions.

AFFIRMED.

2. See the district court's charge to the jury at R.I, p. 166:

"If a person in good faith believes that he had done all that the law requires, he cannot be guilty of the criminal intent to wilfully fail to file a tax return. But if a person acts without reasonable ground for belief that his conduct is lawful, it is for the jury to decide whether he acted in good faith or whether he wilfully intended to fail to file a tax return."

EXHIBIT A
Page 3 of 3

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EXHIBIT "B"

§ 546. (Criminal Code, section 340.) Jurisdiction of district courts.

The crimes and offenses defined in this title shall be cognizable in the district courts of the United States, as prescribed in section 41 of Title 28. (Mar. 4, 1909, ch. 321, § 340, 35 Stat. 1153; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167.)

REFERENCE IN TEXT

The words, "this title," as used in this section refer to the Criminal Code, act Mar. 4, 1909, ch. 321, 35 Stat. 1088. The sections of said act embodied in this code are indicated by parenthetical references in the section catchlines. For full distribution of said act, see tables.

CROSS REFERENCE

United States commissioners, jurisdiction to try petty offenses, see section 576 of this title.